In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 317

OLIVER CLEVE RYLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 103-106) is reported at 183 F. 2d 944.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1950 (R. 106). The petition for a writ of certiorari was filed September 19, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether in the prosecution of petitioner for the illegal sale of narcotics the court's charge was

erroneous as not properly presenting his defense of illegal entrapment.

STATUTE INVOLVED

26 U.S.C. [1946 ed.] 2554(a), (Act of December 17, 1914, Sec. 2, 38 Stat. 786, as amended, 44 Stat. 1023, 1382) provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

STATEMENT

Petitioner was charged with violation of 26 U.S.C. [1946 ed.] 2554(a) in an indictment, under count 1 with unlawful sale of opium, and under count 2 with the unlawful sale of morphine to one Brown, not in pursuance of a written order form prescribed by the Collector of Internal Revenue and not within any of the exceptions provided by law (R. 1-2).[1] The evidence at his trial may be summarized briefly as follows:

After United States narcotic agents learned of petitioner's reputation for engaging in the sale of

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[1] On appeal from petitioner's conviction on a previous trial for the same offenses, he contended that the defense of entrapment should have been submitted to the jury, but the Court of Appeals affirmed upon the ground that no instruction on the law of entrapment had been requested (*Ryles* v. *United States*, 172 F. 2d 72). This Court, at the suggestion of the Solicitor General, granted certiorari and reversed and remanded the case for a new trial (336 U. S. 949).

narcotics at Ada, Oklahoma (R. 25, 26, 48, 50-52),[2] they arranged with the state authorities for the release upon his own recognizance from the jail at Tulsa of one Brown, a drug addict, who was being held on a pending robbery charge for stealing drugs from a doctor.[3] Brown was released so that he might go to Ada to assist in the apprehension of petitioner. (R. 27, 43, 53, 91-94.) A narcotic agent drove Brown and another addict, Wanda Roumaine, who posed as Brown's wife, to Ada, where Brown's expenses of five dollars per day were paid by the Government (R. 12, 13, 23, 27, 32-33). Upon being apprised by Brown of his and his wife's need for drugs to relieve their pain, petitioner on August 18, 1947, sold to Brown for seven dollars a quantity of opium in a bottle [count 1] (R. 9-10, 27-28, 37-38, 55). On August 20, 1947, petitioner sold to Brown for nine dollars four one-quarter grain tablets of morphine sulphate [count 2] (R. 10, 18-21, 29-30, 47-48, 55).[4] In each instance Brown was not furnished with a blank order form

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[2] On September 4, 1944, in the United States District Court for the Eastern District of Oklahoma, petitioner was given two-year sentences on each of three counts, to run concurrently, for illegally altering prescriptions for morphine (R. 55, 65, 67, 89-91). He had also been given a seven-year sentence and was later pardoned on a state court charge of robbery at Ada in 1932 or 1933 (R. 66, 67).

[3] Brown was later convicted on this robbery charge (R. 30, 43, 44, 94-97). He had also been convicted of a narcotic act violation (R. 30).

[4] Petitioner testified, denying the sale embodied in count 1, but admitting delivery of morphine tablets to Brown [count 2] (R. 59-62).

prescribed by the Collector of Internal Revenue; was searched by the narcotic agent for narcotics before making the purchase; was given money by the agent to make the purchase; and returned to the agent the drugs purchased after he had observed the transaction (R. 9-10, 11, 30, 64).

At both the close of the government's evidence and all of the evidence, petitioner's motions for judgment of acquittal by reason of wrongful entrapment were overruled (R. 57, 75). The jury having found petitioner not guilty under count 1 but guilty under count 2, he was sentenced to three years' imprisonment (R. 2, 4-5). The Court of Appeals affirmed the conviction (R. 106-107).

ARGUMENT

1. Petitioner, in asserting that the Court of Appeals' opinion upholding the trial court's instructions is in conflict with *Sorrells* v. *United States*, 287 U. S. 435, contends that the instructions were erroneous because they made the controlling question whether the government agents had reasonable grounds to believe that he was engaged in selling narcotics, instead of whether he was lured into the sale by the activity and persuasion of the informer (Pet. 14, 20-22). There is no merit in this contention since when read as a whole, the charge properly stated the elements of the defense of entrapment.

The Government, as even the petitioner admits (see Pet. 21), had a right to use Brown as an informer or decoy to afford petitioner, a known nar-

cotics peddler, the opportunity of committing an offense. Cf. *Sorrells* v. *United States, supra,* 287 U. S. at 441, 445; *United States* v. *Roett,* 172 F. 2d 379, 381 (C.A. 3), certiorari denied, 336 U. S. 960; *Weathers* v. *United States,* 126 F. 2d 118, 119 (C.A. 5), certiorari denied, 316 U. S. 681. Having sought "acquittal by reason of entrapment," the petitioner's "predisposition and criminal design" were relevant, and he could not complain of "an appropriate and searching inquiry into his own conduct and predisposition." *Sorrells* v. *United States, supra,* 287 U. S. at 451. In establishing the lawfulness of its activities, it was "incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the [petitioner]." *Heath* v. *United States,* 169 F. 2d 1007, 1010 (C.A. 10). Cf. *Mitchell* v. *United States,* 143 F. 2d 953, 957 (C.A. 10). On the trial the prosecution did introduce such proof. Two narcotic agents had been informed by several drug addicts that petitioner was "selling narcotic drugs" and "handling narcotics in the City of Ada" (R. 25, 26, 51-52). Also, the Chief of Police and a police officer at Ada testified that petitioner had a reputation in the community for being a "dope addict" and "handling narcotics" (R. 48, 50). Further, although there was no evidence that petitioner had previously been convicted for the illegal sale of drugs, he had served a sentence for a related offense of

unlawful alteration of certain prescriptions for morphine (see fn. 2, *supra*). Cf. *United States* v. *Becker*, 62 F. 2d 1007, 1008-1009 (C.A. 2). The petitioner's claim that the charge was improper is largely based on particular sentences taken out of context. The charge must be read in its entirety if the instructions are to be understood. On the issue of entrapment the court stated (R. 80-81):

> As to the second count of the indictment, you are instructed that the defendant has admitted making the sale charged in the second count of the indictment but contends that he is not guilty by reason of the fact that he was induced to make the sale as a result of entrapment. As to the second count of the indictment, you are instructed that if you find from the evidence and beyond a reasonable doubt that the sale mentioned therein was not the result of entrapment by the government officers, your verdict should be guilty. On the other hand if you find that it was the result of entrapment or if you entertain a reasonable doubt as to whether it was the result of entrapment, your verdict should be not guilty.
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> You are instructed that entrapment as that term is used in these instructions exists only when government agents induce and originate the criminal intent of the defendant, and there is no entrapment where criminal intent is already present and the government agents merely afford the opportunity for commission of the crime. If an officer of the law has reason to believe that a law is being violated, he

may proceed to ascertain whether those who are thought to be doing so are actually violating the law. The officers of the government, however, must act in good faith and in the honest belief that the defendant is engaged in the unlawful business of which the offense charged in the indictment is a part, and the purpose of entrapment must be not to induce an innocent man to commit crime but to secure evidence upon which a guilty man can be brought to justice. While it may be said that there is entrapment in each case, the result is that one is an illegal entrapment and bars a conviction, whereas the other is a legal entrapment which does not bar a conviction, the distinction being that in one case the officers are justified in what they do—in the other they are not justified. You should therefore consider the evidence offered by both the defendant and the government with the view of determining whether or not the officers of the government were justified in using the informer Brown to induce the defendant to commit the acts charged in the indictment provided, of course, that you find the defendant did commit the acts charged in the indictment, and whether or not Brown merely afforded defendant an opportunity to commit a crime which he was ready and willing to commit or whether or not he lured the defendant by persuasion, continued insistence and representations to commit an offense in order that the government agents might arrest him and prosecute him therefor.

You are instructed that when the evidence is sufficient to raise the issue of entrapment, the

> burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment. You are therefore instructed that if you find from the evidence and beyond a reasonable doubt that the defendant had a reputation for selling narcotics and that the officers of the government had reasonable grounds to believe that he was engaged in selling narcotics and in good faith sought to obtain evidence of such violations, you should convict the defendant as to each count of the indictment if you further find beyond a reasonable doubt that he made the sales as charged. On the other hand if you find from the evidence that the officers had no reasonable grounds to believe that the defendant was engaged in the sale of narcotics and were not acting in good faith to obtain evidence against one not already engaged in violations of the law but used an informer to induce the defendant to make a sale or sales in order to arrest him and prosecute him or if you entertain a reasonable doubt as to whether the officers so acted, your verdict should be not guilty.

In addition, when the court charged the jury with respect to the issue of whether the actions of the government agents prevented a "sale" from taking place, he stated further (R. 82):

> * * * In other words, the officers of the government can't go out and find someone whom they select to make a case on and induce him to commit an act that he never intended to

> do, or have anything to do with, and after he does that then turn around and prosecute him. The government says, we just don't permit that to be done. I think that is the correct view of entrapment rather than try to say that what the man did isn't a violation of the law. The government says, even though it has the appearance of being a violation of law and does come within the purview of the act, we will not permit the prosecution; it is contrary to the policy of the government to permit the prosecution. So I say to you that if you find there was entrapment it makes no difference whether you treat it as a sale or as not a sale because he is not guilty. On the other hand if the elements of entrapment as I have tried to explain to you are sufficient to be allowed and you think that the officers merely afforded this man an opportunity to commit this offense and he delivered the narcotics under the circumstances outlined here it is a sale. * * *

When read as a whole the charge appears substantially the same as that which was upheld in *Newman* v. *United States*, 299 Fed. 128, 132 (C.A. 4). We submit that the charge was in proper form and, as we have pointed out above (see p. 5, *supra*), there was ample evidence that the narcotics agents had reasonable ground to believe that petitioner was engaged in the illegal sale of drugs to warrant an incorporation of that element in the charge.[5]

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[5]Petitioner cites *Peterson* v. *United States*, 255 Fed. 433 (C. A. 9) as authority that the trial court erred in instructing

2. Neither is there any substance in petitioner's contention that the trial court erred in refusing to give his requested instructions No. 1 through 5 [R. 98-100] (Pet. 22-25). The court's charge adequately covered all the various aspects of the case, and the refusal to give the petitioner's requested instructions, when the substance of them was included in the charge as given, was not error. Cf. *United States* v. *Trenton Potteries,* 273 U. S. 392, 396.

Petitioner's requested instructions Nos. 1, 3 and 4 all deal with the definition of, and the general law as to entrapment, and their substance was included in the court's charge (see R. 80-81). As to requested instruction No. 2, although the charge did not refer to Brown as a government agent, it did designate him as an informer (R. 81, 82, 83),[6] there being no substantial difference in the two terms in the application of the doctrine of entrapment.[7] As to requested instruction No. 5, the charge contained a clear general burden of proof

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the jury on entrapment (Pet. 21). However, there the trial court had taken away from the jury the defense of entrapment, and the appellate court granted a new trial because that issue should have been submitted to the jury as a controverted question of fact. 255 Fed. at 436-437. In the instant case, however, the entrapment issue was properly submitted to the jury.

[6] The charge, in part, read:

"You should therefore consider * * * whether or not the officers of the government were justified in using the informer Brown to induce the [petitioner] to commit the acts charged in the indictment * * *" (R. 80-81).

[7] Neither *Butts* v. *United States,* 273 Fed. 35 (C.A. 8), nor *Cermak* v. *United States,* 4 F. 2d 99 (C.A. 6) (see Pet. 23-24),

instruction [8] and another such instruction on the issue of entrapment.[9]

CONCLUSION

There is no conflict in the decisions and no question warranting further review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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holds that the government decoy used must be referred to in the entrapment instruction as an "agent" and cannot be called an "informer."

[8] "The burden is upon the government to prove the material allegations in each count of the indictment, and before you would be warranted in finding a verdict of guilty, the evidence must be such as convinces you of the guilt of the [petitioner] beyond a reasonable doubt" (R. 78-79).

[9] "You are instructed that when the evidence is sufficient to raise the issue of entrapment, the burden is upon the government to prove by competent evidence to the satisfaction of the jury beyond a reasonable doubt that it was not entrapment" (R. 81).

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